71-1021

No.

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES
October, Term 1970

WALTER JOHN McANDREW and LAWRENCE EDWARD McANDREW by their Guardian ad Litem Walter Joseph McAndrew,

Petitioners,

v.

SELECTIVE SERVICE BOARD 22, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE NINTH CIRCUIT

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No.

SUPREME COURT OF THE UNITED STATES
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WALTER JOHN McANDREW and LAWRENCE EDWARD McANDREW by their Guardian ad Litem Walter Joseph McAndrew,

Petitioners,

v.

SELECTIVE SERVICE BOARD 22, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE NINTH CIRCUIT

The petitioners, Walter John McAndrew and Lawrence Edward McAndrew, by their Guardian ad Litem, Walter Joseph McAndrew, hereinafter referred to as petitioners, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals from the Ninth Circuit rendered in these proceedings on March 12, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals from the Ninth Circuit, *McAndrew* v. *Selective Service Board No. 22*, 438 F.2d 534, appears in Appendix A, infra, at page 2 . The Memorandum and Order of the United States District Court for the Eastern District of California is unreported and appears at page 3 of Appendix A. The United States Court of Appeals from the Ninth Circuit affirmed the Memorandum and Order of the United States District Court for the Eastern District of California by a per curiam opinion.

JURISDICTION.

The United States Court of Appeals denied petitioners' Petition for rehearing on April 12, 1971. See Appendix A at page , infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Is Section 10(b)(3) of the Military Selective Service Act of 1967 unconstitutional and in violation of the Fifth Amendment's due process because, pursuant to administrative regula-

tion, local draft boards prohibit registrants assistance of counsel at the hearing to which they are entitled under the law?

2. Is the regulation prohibiting a registrant assistance of counsel at his local draft board hearing outside of the President's power to promulgate under the authority of the Military Selective Service Act of 1967?

3. Is pre-induction judicial review available to petitioners to resolve the above questions?

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATIONS INVOLVED

Constitutional Provision

Constitution of the United States, Amendment V, provides in relevant part:

> "No person shall be . . . deprived of life, liberty, or property without due process of law; . . ."

Statutory Provisions:

Military Selective Service Act of 1967, 81 Stat. 104, Section 10(b)(1), 50 U.S.C. App. Section 460 (b)(1), provides in relevant part:

> ". . . Such local boards, or separate panels thereof each consisting of three or more members, shall, under the rules and regulations prescribed by the President, have power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal . . . all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title."
>
> ". . . No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of

this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided* that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Federal Regulation.

32 CFR Section 1624.1, as promulgated by President Truman, provides in relevant part:

"(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

"(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with, or on behalf of a registrant; *Provided*, that if the registrant does not speak English adequately he may appear with a person to act as interpreter for him; *and provided further*, that no registrant may be represented before the local board by anyone acting as attorney or legal counsel." *1

---

*1 (Section 1624.1(a) was amended by President Johnson by Executive Order No. 11350 on May 3, 1967, in respects not material here. 32 F.R. 6961).

STATEMENT OF FACTS

The facts relevant to the questions presented by these petitioners are uncontroverted and therefore may be introduced to the Court in a summary fashion.

Both petitioners registered with their local draft board in accordance with the Selective Service Act when they were 18 years of age. Both ultimately were classified 1-A. Thereafter, in September, 1969, both filed a request to be classified as 1-A-0 (conscientious objector available for noncombatant military service only), a request for an appearance before their government appeals agent, and to have a hearing before their boards.

At their meeting with the government appeals agent both were advised that, because of a recent federal court holding,*[1] they could have assistance of counsel at their hearing before their local board. At their duly scheduled hearings both appeared before their local board with counsel and were denied such assistance. Both refused to proceed with the hearing without counsel but filed written statements they had been asked to prepare for such hearing. Thereafter, their boards on December 11, 1969, announced their classifications were to continue as before. Each petitioner filed a timely request for an administrative appeal which they have been informed by the government's attorneys is being held in abaence pending the outcome of this action.

The jurisdiction of the lower court was invoked under 28 U.S.C. Sections, 1331, 1361, 2201, 2282 and 2284 and Section 1 of Articles I, II and III of the Constitution and the Fifth Amendment of the Constitution.

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[1] See *United States v. Weller*, No. 42614, United States District Court, Northern District of California, opinion unreported but appearing in Appendix B at page ; cert. den. by this Court on procedural grounds, U.S. , 91 S.Ct 602 (1971). *2

REASONS FOR GRANTING THE WRIT

I

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED SEVERAL FEDERAL QUESTIONS OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT

It might be concluded that the per coriam opinion of the United States Court of Appeals for the Ninth Circuit decided all questions presented in this petition in the negative. However, it resolved the "right to counsel" issue on Sixth Amendment grounds which were never urged by petitioners.*2

Petitioners present a case of first impression inasmuch as they claim that the Fifth Amendment's due process guarantee is violated by the denial of counsel at their local board's hearings, an issue yet to be resolved on either the federal district or appellate court level.

The lower court denied petitioners relief on jurisdictional and procedural grounds only, never reaching petitioners' case on the merits. By so doing, it decided another question of first impression; does this Court's interpretation of the Selective Service Act of 1967, 81 Stat. 104, Section 10(b)(3), in *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402 (1968) apply to the facts in petitioners' case? The lower court found this Court's opinion in *Clark* v. *Gabriel*, 393 U.S. 256, 89 S.Ct. 424, 21 L.Ed.2d 418 (1968) pursuasive and concluded that the Section 10(b)(3) language as interpreted by this Court prohibited pre-induction judicial review in petitioners' case; and hence they would be required to wait to raise their objection to the denial of counsel at

*2 See *United States* v. *Evans*, 425 F.2d 302 (9 Cir. 1970) and cases cited therein all holding no Sixth Amendment right to counsel.

their local board hearing either as a defense in a criminal prosecution or in a habeas corpus proceeding after induction.

It seems clear that neither the lower court or the appellate court would have decided petitioners' case differently had their administrative appeals been terminated. Hence, a further legal issue of first impression is presented to this Court; under these facts, does the rational of *McKart* v. *United States*, 395 U.S. 183, 89 S.Ct. 1657 L.Ed.2d 174 (1969), or that of *McGee* v. *United States*, U.S. , 91 S.Ct. 1565, L.Ed.2d (1971), control? This Court granted certiorari in *Breen* v. *Selective Service Local Board No. 16*, 396 U.S. 460, 90 S.Ct. 661, 24 L.Ed. 2d 653 (1970) when the registrant's case was pending before his state appeals board, as is the case with petitioners, and held that the *Oestereich* exception gave it jurisdiction. It would, therefore, appear that in Selective Service cases where pre-induction review is proper the *McKart* and not the *McGee* rational is appropriate. Petitioners' case squarely presents this issue.

II

THE UNITED STATES COURT OF APPEALS FROM THE NINTH CIRCUIT HAS RENDERED A DECISION IN PETITIONERS' CASE IN CONFLICT WITH THE UNITED STATES COURT OF APPEALS FROM THE EIGHTH CIRCUIT ON THE SAME MATTER.

The Ninth Circuit United States Court of Appeals per curiam opinion in this case did not decide petitioners' case on the merits. Petitioners squarely raised the issue of this Court's *Oestereich* rational in seeking pre-induction judicial review. On this issue the Ninth Circuit has held that even though only questions of law are presented which would be decided in plaintiff's favor should the issue be raised in a criminal prosecution.

there cannot be pre-induction judicial review as the federal court under *Oestereich* has no jurisdiction at such time to decide them. See *Petri* v. *United States*, 407 F.2d 267 (9 Cir. 1969), where the court reversed a criminal conviction because the selective service board had erred in refusing to reopen a registrant's case when he had made a *prima facia* case for a different classification on the authority of this Court's opinion in *Mulloy* v. *United States*, 398 U.S. 410, 90 S. Ct. 1766, 26 L.Ed. 2d 362 (1970), but, when the same issue was raised in a pre-induction case, *Rheingans* v. *Mitchell*, 438 F.2d 345 (9 Cir. 1971), the court rendered a per curiam opinion denying it had jurisdiction because of the *Oestereich* rational. It concluded that the admitted legal error committed by the local board could not be corrected until the registrant had received his order for civilian work as a 1-0, refused, been criminally indicted for such refusal and raised such error as a defense to a criminal prosecution.

On the other hand, the Eighth Circuit has held a contrary view. In *Zerillo* v. *Local Board No. 102*, 440 F.2d 136 (8th Cir. 1971), at page 138 that court concluded:

> "under the recent Supreme Court decisions interpreting section 460(b)(3), the issue of jurisdiction to challenge a local board's action in classification or processing of a registrant prior to induction is inextricably intertwined with the merits of the controversy."

In rejecting the approach taken by the Ninth Circuit, the Zerillo court at page 139 explained why it felt compelled to read this Court's opinion in *Oestereich* v. *Selective Service System Local Board No. 11, supra,* to require a decision on the merits to resolve the jurisdictional issue:

> ". . . in effect, two courts are required to examine the merits (if pre-induction review is denied). This result appears not only to be wasteful of judicial time

> but lends itself to the litigious interruptions of military manpower procurement that 460(b)(3) was designed to prevent."

The Eighth Circuit has followed the above rational in *McLain* v. *Selective Service Local Board No. 47*, 439 F.2d 737 (8th Cir. 1971) and *Liese* v. *Local Board No. 102*, 440 F.2d 645 (8th Cir. 1971). Other federal circuits demonstrate the kind of confusion on this issue which urgently called for this Court's judicial guidance. In the First Circuit, the district court in *Lane* v. *Local Board No. 17*, 325 F.Supp. 1355 (D.C. Mass) found it had jurisdiction to grant pre-induction judicial review and reversed a local board's action on the authority of *Mulloy* v. *United States*, *supra*, only to be overruled by the First Circuit United States Court of Appeals (*Lane* v. *Local Board No. 17*, No. 7740, F.2d (1st Cir. 1971). In the Third Circuit, the district court found it had jurisdiction to grant pre-induction review in *Piendak* v. *Local Board No. 5*, 318 F.Supp. 1393 (D.C. Pa.) on the authority of *Bucker* v. *Selective Service System Local Board Nos. 2*, etc., 421 F.2d 24 (3rd. Cir. 1970). Before the Ninth Circuit Appellate Court petitioners' relied on the Third Circuit opinion, *Hunt* v. *Local Board No. 197*, 423 F.2d 576 (3 Cir. 1970), as did the *Lane* district court. Now that opinion has been withdrawn and a rehearing granted.*1

At oral argument the appellate court admitted that petitioners' authority on this issue was unreconcilably in conflict with its own 9th circuit opinion in *Bookout* v. *Thomas*, 430 F.2d 1343 (9 Cir. 1970). The government urged upon the court the rational of *Edward* v. *Local Board*, 432 F.2d 287 (5th Cir. 1970). The appellate court rejected both parties' authority. In that case the Court reviewed the merits of plaintiff's complaint and decided he had not made out a *prima facia* case for reopening of his classification. The *Edward* court defined the *Oeste-*

*1 For a scholarly discussion of this complex problem, see, Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 Mich. L. Rev. 55 (1970).

reich rule as covering "blatantly lawless" local draft board conduct which is without a statutory basis, conflicts with rights explicitly established by statutes and is not dependent upon an act of judgment by the selective service officials (see 432 F.2d 287 at 292). Petitioners urge that their local draft board's conduct meets this test. Their right to a hearing is explicitly established by statute. Their denial of counsel at such hearing put them to the untenable choice of proceeding with their hearing without such assistance or going without their hearing. Petitioners contend their denial of assistance of counsel is unconstitutional and without a statutory basis. The resolution of this purely legal question is not dependent upon an act of judgment by their selective service officials. Hence, it was error for both the district court and the appellate court to dismiss their complaint; for lack of jurisdiction without reaching the merits of their claim.

This Court has declared:

> "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule of law and rule by fiat." *Wisconsin* v. *Constantineau*, 400 U.S. , 91 S.Ct. 507 at 510, 27 L.Ed.2d 515 (1970)

The present confusion on what procedural errors may be corrected under the Selective Service System prior to induction because of the different views of the federal circuit courts of appeal of this Court's opinion in *Oestereich* v. *Selective Service System Local Board No. 11, supra*, may be clarified if this Court grants petitioners' petition. Petitioners urge their case squarely presents an opportunity for this guidance. Their "right to counsel" issue is a procedural one of first moment.

Mr. Justice Douglas suggested in his dissent in *Ehlert* v. *United States*, U.S. , 91 S.Ct. 1319, L.Ed.2d (1971) at 1327:

> "Decision as to whether an individual is entitled to a conscientious objector status under these broad criteria [as established in *United States* v. *Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733, and *Welch* v. *United States*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed. 2d 308] requires great sensitivity on the part of those who have the final say."

The hearing before their local board is the *only* hearing the law now provides for a conscientious objector because of the 1967 changes which deleted the Justice Department hearing where counsel was permitted. If the Military Selective Service Act requires untrained, many time inarticulate registrants to present their cases for conscientious objector status before their local boards without assistance of counsel against the background of the broad criteria established by this Court in *Seeger* and *Welch*, "rule by fiat" must prevail. This, petitioners contend, the Fifth Amendment prevents. Hence, as presently being administered, 10(b) (3), 50 U.S.C. App. Section 460(b) (3), is unconstitutional.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

HORACE E. CECCHETTINI
CATHERINE D. McANDREW
Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER JOHN McANDREW and LAWRENCE EDWARD McANDREW by their Guardian ad Litem Walter Joseph McAndrew, *Plaintiffs and Appellants,* v. SELECTIVE SERVICE BOARD No. 22, 35 et al., *Appellees.*	No. 26,100 Order Denying Petition for Rehearing

On Appeal from the United States District Court for the Eastern District of California

Before: CHAMBERS, KOELSCH and BROWNING, Circuit Judges.

Per curiam:

The final order of dismissal is affirmed.

This circuit has held that a registrant's demand to be represented by counsel at a draft board hearing may be rejected, as it was here. *United States* v. *Evans*, 9 Cir., 425 F.2d 302.

2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER JOHN McANDREW and LAWRENCE EDWARD McANDREW by their Guardian ad Litem Walter Joseph McAndrew, *Plaintiffs and Appellants,*	)	No. 26,100
v.	)	
SELECTIVE SERVICE BOARD No. 22, 35 et al., *Appellees.*	)	

Before: CHAMBERS, KOELSCH and BROWNING, Circuit Judges.

The Petition for Rehearing is denied.

Office of the Clerk, U.S. Court of Appeals, P.O. Box 547, San Francisco, California 94101. April 12, 1971.

Cecchettini & Gregory
2131 Capitol Ave.
Sacramento, California 95816

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 26100 — *W.G. McANDREW, et al. v. SELECTIVE SERVICE BOARD No. 22* was this day denied.

Pursuant to Rule 41 (a), and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of seven (7) days from the date hereof.

Sincerely,

WM. B. LUCK,
Clerk.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER JOHN McANDREW and LAWRENCE EDWARD McANDREW by their Guardian ad Litem, WALTER JOSEPH McANDREW, *Plaintiffs,*	)	
v.	)	CIVIL NO. S-1509
SELECTIVE SERVICE BOARD NO. 22, RALPH T. LUI, PAUL TAKEHARA, JERRY TRAYLOR, MICHAEL B. JACKSON, MILTON P. KJER, ROBERT B. RUTTER, Members; CALIFORNIA STATE APPEALS BOARD, Eastern District; CARLOS C. OGDEN, as Director of Selective Service of the State of California; and LEWIS B. HERSHEY, as Director of Selective Service of the United States of America, *Defendants.*	)	

MEMORANDUM AND ORDER

Civil action for temporary restraining order, injunction, mandamus and declaratory judgment. Action dismissed for lack of jurisdiction.

Plaintiffs have been classified I-A by action of their local Selective Service Board on December 18, 1969. Both plaintiffs had made proper and timely requests for classification as I-A-O (conscientious objector available for noncombatant military service only) and timely requests for personal appearances in support of their claims.

However, when the time for the personal appearances came, both plaintiffs were accompanied by their mother, Mrs. Catherine D. McAndrew, a member of the State Bar of California. Both plaintiffs demanded that they be allowed the assistance of their mother as legal counsel at the appearance before the board.

The board, acting pursuant to a Selective Service Regulation forbidding presence of counsel before the board (32 C.F.R. Sec. 1624.1 (b)), refused to allow Mrs. McAndrew to be present as counsel. Thereupon the plaintiffs refused to proceed with the appearance and were subsequently classified I-A. Their files were forwarded to the State Appeals Board for review.

The purpose of the present action is to have the I-A classification set aside, and to require the local board to grant new personal appearances at which they will be allowed representation of counsel. They allege that the regulation which forbids representation by counsel is unconstitutional in that it violates the Fifth Amendment of the United States Constitution, and (alternatively) that it is not authorized by the Selective Service statutes.

It is the contention of the government, and the Court agrees, that the Court lacks jurisdiction to consider this matter because of the provisions of 50 U.S.C.A. App. Sec. 460(b) (3). Furthermore, even if this were not the case, jurisdiction is lacking because plaintiffs have failed to exhaust their administrative remedies.

1. 50 U.S.C.A. App. Sec. 460(b) (3) and the Doctrine of Oestereich and Breen.

A literal reading of Sec. 460(b) (3) of Title 50 Appendix would quickly lead to the conclusion that the Court lacks jurisdiction in this matter. In pertinent part the section reads as follows:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, that such review shall go to the question of jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Recent cases, however, indicate that this section is not to be construed literally so as to bar all review before induction or refusal of induction. The two leading cases permitting preinduction review are *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233, 89 S.Ct. 414 (1968) and *Breen* v. *Selective Service Local Board No. 16*, U.S. , 38 L.W. 4122 (Jan. 26, 1970). Plaintiffs contend that their case is within the doctrine of these two cases. This Court holds otherwise.

Oestereich had a IV-D exemption because he was a ministerial student. After returning his registration card to his local board in order to protest the war in Viet Nam, he was declared delinquent, reclassified I-A, and ordered to report for induction. Upon losing his administrative appeal, he sued to restrain his induction. The district court dismissed and was upheld by the circuit court, but the Supreme Court reversed, holding preinduction review and restraint of induction proper notwithstanding the language of Section 460 (b) (3).

The court examined the board's treatment of Oestereich and found it "basically lawless." It stated that there was no authorization for the board's use of delinquency and denial of an exemption granted by statute.

The court stressed that there was no exercise of discretion involved in the board's evaluation of evidence and determina-

tion of a claim of a IV-D exemption. To preclude review of such a "blantantly lawless" deprivation of exemption until after induction (through habeas corpus) or refusal of induction (as a defense to a criminal charge) would be "to construe the Act with unnecessary harshness." The court stated that its construction leaves Sec. 460(b) (3) "unimpaired in the normal operations of the Act." 393 U.S. 238.

Breen was a very similar case involving a music student having a II-S deferment who had been declared delinquent and reclassified I-A after publicly turning over his registration card to a minister at a public gathering as a war-protest gesture. The court held that the doctrine of *Oestereich* applied to Breen's case. It made no difference that ministerial students had an "exemption" under the statute (IV-D) while other students had only a "deferment." *Breen* did not add anything to the doctrine of *Oestereich*, but simply established that where there was a "clear departure by the board from its statutory mandate" in ordering induction of a registrant "required by the relevant law not to be inducted," the doctrine applied regardless of whether the classification taken away was called a "deferment" or an "exemption."

The case presented by the plaintiffs bears little similarity to either *Oestereich* or *Breen*. Plaintiffs have not been subjected to a lawless use of a delinquency declaration as punishment for protest. Furthermore, the classification they seek, I-A-O, is not theirs as a matter of right under the statute, as with the II-S and IV-D classifications. Without these factors, *Oestereich* does not apply. Instead, plaintiffs' case is governed by *Clark v. Gabriel*, 393 U.S. 256, 89 S.Ct. 853 (1969), which was decided at the same time as *Oestereich*.

Gabriel's claim to conscientious objector classification had been rejected and he had been classified I-A. He had lost his appeals within the Selective Service System and was ordered to report for induction. Thereupon he brought an action in district court to enjoin his induction and to have the rejection of his

conscientious objector status declared improper on the grounds that it had no basis in fact, that the Board had misapplied the statutory definition of conscientious objector, and that the members of the Board were improperly motivated by hostility against those who claim to be conscientious objectors.

The court stated that Gabriel's case was governed by the same reasoning as in *Oestereich* and went on to compare the two cases:

> In *Oestereich* the delinquency procedure by which the registrant was reclassified was without statutory basis and not dependent upon an act of judgment by the board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned upon the registrant's claim being "sustained by the local board." 50 U.S.C. App. Sec. 456(j) (1964 ed., Supp. III).
>
> Here the Board has exercised its statutory discretion to pass on a particular request for classification, "evaluating evidence and * * * determining whether a claimed exemption is deserved." Oestereich v. Selective Service System Local Board No. 11, supra, at 238, 89 S.Ct., at 416.

Thus the *Oestereich* exception, by clear and explicit holding of the Supreme Court, applies only to cases where a registrant is denied a classification he is *unconditionally* entitled to by statute, and not to classifications granted in the exercise of the board's discretion, like the conscientious objector status. Plaintiffs cannot invoke *Oestereich* simply by terming the Board's action lawless, unconstitutional, or outside its jurisdiction. See *Murray* v. *Vaughan*, 300 F. Supp. 688 (D.R.I. 1969).

2. Failure to Exhaust Administrative Remedies.

Even if Congress had not foreclosed jurisdiction in this matter by the enactment of Section 460(b) (3), judicial consideration of the matter would nevertheless be foreclosed by the well-established and still viable requirement of exhaustion of administrative remedies. *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817 (2d Cir. 1967) does support the proposition that exhaustion is not always required. But the *Wolff* exception applies only where the local board has acted outside the statutory limits of its jurisdiction and its action has a chilling effect upon free speech. This is not such a case.

IT IS THEREFORE ORDERED that this action be, and the same is, hereby dismissed.

DATED: MAY 19th, 1970.

/s/ PHILIP C. WILKINS
UNITED STATES DISTRICT JUDGE

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[1] While Section 460(b) (3) and the exhaustion doctrine both foreclose judicial review, I do not therefore consider the statute to be merely an enactment of the judicial doctrine. The former is jurisdictional in nature and cannot be changed by judicial discretion, while the latter is a flexible doctrine controlling the timing of judicial review and related to such problems as ripeness and justiciability. See *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817 (2d Cir. 1967).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,*	)	No. 42614
v.	)	ORDER GRANTING MOTION TO DISMISS INDICTMENT.
THOMAS WILLIAM WELLER, *Defendant.*	)	

The Defendant has made a motion to dismiss the indictment against him pursuant to Fed. R. Crim. P. 12. Defendant contends that his constitutional rights were violated because his request to have his attorney present during the personal appearance on his conscientious objector claim was denied pursuant to 32 C.F.R. Section 1624.1(b) which provides:

> . . . no registrant may be represented before the Local Board by anyone acting as attorney or legal counsel.

Alternatively, the defendant contends that the section of 1624.1(b) quoted above is not authorized by the Selective Service Act of 1967, 50 U.S.C.A. App. Section 451, et seq.

The pertinent facts, which are apparent from the Defendant's Selective Service file, are as follows: The Defendant requested, received and filed with his local board a Form 150 (Special Form for Conscientious Objector). The board classified the Defendant I-A and the Defendant requested a personal appearance. The Board scheduled the appearance for November 8, 1967. The Board received a letter from the Defendant's attorney on November 6, 1967 which requested that the board grant Defen-

dant's attorney permission to be present at the personal appearance to advise him with respect to his rights. Relying on 32 C.F.R. Section 1624.1(b), the board denied the requested permission. Following the hearing, the Defendant's board declined to reopen his case and retained him in class I-A. The Defendant then unsuccessfully appealed this classification.

There is no question that the hearing before the local board on a registrant's claim for conscientious objector status is a critical stage of an administrative process at which substantial rights are adjudicated. The failure to sustain one's claim can result in requiring a registrant to serve his country in a manner different both in type (a I-A-O serves in the armed services in a non-combatant capacity) and in hazard (a I-O performs non-military alternative service in the national interest).

In *Greene* v. *McElroy*, 360 U.S. 474, (1959), the Supreme Court held that the administrative denial of traditional forms of fair procedure, particularly where substantial constitutional doubts are raised, are not to be presumed to be authorized "by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." The *Greene* case dealt with the administrative withdrawal of security clearance causing the plaintiff's loss of a job in private industry, and the procedural safeguards which were missing were the right to confrontation and cross-examination of those who gave information adverse to Mr. Greene. Certainly, failing to establish a conscientious objector claim is as serious as the impact of loss of the right to have access to classified information (hardly what most people would consider to be a "right"). The right to counsel is also a traditional safeguard, and the only apparent reason it was not dealt with in *Greene* is because Mr. Greene was represented by counsel in all of his proceedings. Indeed, of what value would be the right to confrontation and cross-examination without the right to counsel skilled in those arts? It seems clear that the affirma-

tive denial of the right to be represented by retained counsel, even in a "civil" proceeding, where substantial loss of liberty may be at stake, is subject to grave constitutional doubts. *In re Gault*, 387 U.S. 1 (1967).

In spite of the fact that the *Greene* court did not decide that the plaintiff had a *constitutional* right to confrontation and cross-examination, the court held that plaintiff had such rights because the "Nation's lawmakers" did not *explicitly* authorize their withdrawal by the Defense Department. Accordingly, in the case at bar, the only "lawmakers" who could explicitly authorize the denial of counsel in hearings before the local draft boards are Congress, not the President, since the President could not raise an army, through induction, without the authority of Congressional legislation.[1]

However, nowhere in the Act has Congress expressly denied the right to counsel or expressly delegated the power to do so to the President. The only possible sources of such a delegation are Section 1(c) which states that service should be "in accordance with a system of selection which is fair and just . . . . ." and Section 19(b) (3) which provides "such local boards . . . shall, under rules and regulations prescribed by the President, have the power . . . to hear and determine . . . all questions and claims with respect to . . . exemption . . . ." These sections clearly are not "explicit action by the Nation's lawmakers" (in this case Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel.

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[1] While under Article 2, Section 2 of the Constitution the President is Commander in Chief of the Armed Forces (See *Cafeteria Workers v. McElroy*, 367 U.S. 886), under Article 1, Section 8, Congress, not the President, (See *Swaim v. United States*, 28 Ct. Cl. 173, *aff.* 165 U.S. 553 (1893); 6 Op. Atty. Gen. 10 (1858), is given the power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy and to make all laws necessary and proper for the execution of those powers. It is pursuant to those Congressional powers that the Selective Service Act of 1967 was passed, and it was obviously upon the premise that only Congress could raise an army that Congress found it necessary to authorize the President "to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces." 50 U.S.C.A. App. Section 454(a).

In *Greene* the argument was made that delegation of the power pruning the traditional procedural rights should be found because of Congressional and Presidential acquiescence in the program. The court dismissed the contention as follows:*

> If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here . . . . We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, *within their respective constitutional powers*, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use . . . . Such decisions cannot be assumed by acquiescence or nonaction . . . . They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them. [Emphasis added.]

Greene, therefore, is persuasive authority for the proposition that 32 C.F.R. Section 1624.1(b) is not authorized by the statutes.

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* 360 U.S. at 506-507.

Six years prior to *Greene* the Supreme Court decided *United States* v. *Nugent*, 346 U.S. 1 (1953) (5-to-3 decision). The defendant contended that the requirement of a "hearing" under the then existing section 6(j) of the Selective Service Act meant that he should be entitled to cross-examine those who gave statements to the F.B.I. deliterious to his claim. The Court denied this claim, feeling that the "6(j) hearing" was not a "determinative" one and that there was "no time" for "litigious interruption." The first person is not applicable to our situation because now the hearing before the board is determinative. Reason two is not persuasive and was not followed in *Greene*. If litigious delays of potential members of the armed forces are of concern, *a fortiori* such delays regarding those already in the service are of equal if not greater concern. Yet, counsel participate in hearing with respect to members of the army who claim conscientious objector status. Army Regs. 635-20, para. 4(d) (Jan. 22, 1969). Finally, *Nugent* was not a "right to counsel" case, and the governmental interest in protecting sources of confidential information is more compelling than preventing a possible slight delay caused by the presence of retained counsel at a registrant's personal appearance. Indeed, counsel was permitted to participate in the "6(j) hearings". *Storey* v. *United*

States, 370 F.2d 255 (9th Cir., 1966).[2] As Mr. Justice Frankfurter so eloquently stated in his dissent:

> Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake, and where prison may be the alternative to an abandonment of conscience. *The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be 'overborne by military exigencies.* 346 U.S. at 12, 13 [Emphasis added.]

The right to counsel has been considered increasingly important in recent years. Indeed, the Supreme Court has held it to be such a fundamental right that even in juvenile proceedings, supposedly non-adversary, the youth has a constitutional right to counsel of his own:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the pro-

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[2] It is interesting to note that following the *Greene* case President Eisenhower, in Executive Order 10,865, set up a security clearance procedure which included the opportunity to be represented by counsel. Exec. Order No. 10,865, 25 Fed. Reg. 1583 (1960), as amended in 3 C.F.R. Section 512 (1968). The *Nugent* case was subsequently followed in *Gonzales* v. *U.S.*, 364 U.S. 59 (1960). Petitioner claimed denial of due process because he was denied, at trial, the right to have the Justice Department hearing officer's report, as well as the original report of the F.B.I. The Court rejected this claim, holding that neither was relevant at trial as the case "centered entirely on the Department's recommendation, which petitioner repudiated, but which both the appeal board and the court below found supported by the record." 364 U.S. at 64. Although "following" Nugent, the Court concluded that: "This is not to say that there might not be circumstances in a particular case where fairness in the proceeding would require production. *No such circumstances, as foundation for a claim of actual unfairness, are before us.*" 364 U.S. at 65. [Emphasis added.] Therefore, the holding in *Gonzales* is not persuasive in deciding the case at bar, because it was based wholly on the Court's conclusion that the facts demonstrated that Gonzales suffered no unfairness due to the denial of production of the documents. The reasoning of the *Greene* court, to the contrary, is much like the present case, because the possibility of unfairness to petitioner Greene certainly no greater than to defendant Weller led the court to hold that the denial of traditional safeguards was not to be inferred, but rather required explicit authorization.

> ceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.' *In re Gault, supra.*, at 36. [Citations omitted.]

Even though the right to counsel has been so considered, lower federal courts have consistently taken the position that there is no right to be represented by retained counsel at Selective Service hearings. *Nickerson* v. *United States*, 391 F.2d 760 (10th Cir.); *cert. denied* 392 U.S. 970 (1968); *United States* v. *Dicks*, 392 F.2d 524 (4th Cir. 1968); *United States* v. *Capson*, 347 F.2d 959 (10th Cir. 1965); *Tantash* v. *United States*, 409 Fed. 2d 227 (9th Cir. 1969); *Haven* v. *United States*, 403 Fed. 2d 384 (9th Cir. 1968). In most of the cases in which the matter has been raised, the courts have either dismissed it with no discussion, placed their reliance on the fact that the personal appearance of the registrant before the board is not at a criminal proceeding within the ambit of the 6th Amendment, or held that failure to request counsel deprived the registrant of standing to raise the issue. (e.g., *Haven, supra.*) In still other cases the Court's language has merely been dictum. See *Tantash, supra; Haven, supra.* No case cited to the Court by the government or found by this Court has addressed itself to the apparent lack of specific authorization in the Selective Service Act for the denial of counsel before the local boards.

The often-abbreviated and sometimes-cryptic treatment of this traditional procedural safeguard has persisted in spite of the many significant procedural developments in other areas of the law. While conscientious objector status may be a "privilege" and not a "right" (See *Uffelman* v. *United States*, 230 F.2d 297 (9th Cir. 1956)), it is now established that the government may not distribute its largesse in a manner which ignores traditional procedural safeguards. Although the issuance of a liquor license would hardly be considered by most a "right", nevertheless an

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applicant for a liquor license has far more procedural rights than a Selective Service registrant whose life may ultimately be placed in jeopardy. See *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964). Likewise a welfare recipient has more procedural rights than a Selective Service registrant, see *Kelly* v. *Wyman*, 294 F.Supp. 893 (S.D. N.Y. 1968) (three judge court), as does an applicant for admission to the bar. See *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963). In the area of juvenile proceedings the arguments that a juvenile has a right "not to liberty but to custody," that proceedings are "civil" rather than "criminal", and that the proceedings are non-adversary were advanced in order to justify elimination of the right to counsel. Although the constitutionality of the juvenile court laws had been upheld in over 40 jurisdictions, nevertheless the Supreme Court rejected these justifications. *In re Gault*, *supra*. When the reasoning of the Gault case was advanced in the selective service context, one court of appeals cited two pre-*Gault* court of appeals cases and one 1911 Supreme Court case dealing with abridgment of freedom to contract to hold "it is well settled that there is no Constitutional right to counsel in administrative proceedings under the Selective Service Act." *United States* v. *Dicks*, *supra*. The court so decided despite the fact that the vague standards, burdensome volume, and restricted review in the Selective Service System cases lend themselves to precisely the same kind of abuse which Dean Pound in 1937 found should be surrounded by more formal procedural safeguards and the Supreme Court in 1967 held required the right to counsel. *Gault*, *supra* at 18-19. See also Report of the National Advisory Commission on Selective Service.[3] It has even been held that in small claims proceedings which are clearly "civil" and may even be classified as "de minimus", the right to have counsel make a meaningful appearance somewhere in the proceedings cannot be withdrawn. *Mendoza* v. *Small Claims Court*, 49 C.2d 668, 321 P.2d 9 (1958); *Prudential Ins. Co.* v. *Small Claims Court*, 76 C.A. 2d 379, 173 P.2d 38 (1946).

Cases such as *In re Groban*, 352 U.S. 330 (1957) (5-to-4 decision) and *Madera* v. *Board of Educ.*, 386 F.2d 778 (2nd Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968), do not compel a different result. In the *Groban* case it was held that a witness was not entitled to be assisted by retained counsel when giving testimony before a Fire Marshall.

In *Madera* a parent and child were denied permission to be represented by counsel at a guidance conference involving their child pursuant to a Board of Education Regulation. If a person is not entitled to be represented by counsel before a Fire Marshal, before a Grand Jury or before guidance counselors, it is because these proceedings are preliminary in nature and in no way result in a final adjudication. *Madera, supra* at 788; *In re Groban, supra* at 334. If a charge imperiling an individual's liberty were to arise from one of these hearings, a trial would ensue at which the government would have the burden of proof, and the defendant, with the aid of counsel, could attack the substance of any conclusions tentatively reached at the preliminary hearing which resulted in the charge. The *Madera* court's reliance on the failure of the court in *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) to add right to counsel to its outline of a fair proceeding prior to suspension of a student is misplaced, since the plaintiffs in their pleadings did not request the right to counsel. *Dixon, supra* at 151, n.1. Furthermore, to the extent that the *Madera* case relies on Selective Service cases for authority it is for present purposes circular.

In contrast to the preliminary nature of the above proceedings, a registrant's personal appearance before his local board is in every sense an adjudication at which the registrant should be awarded traditional judicial safeguards. See *Hannah* v. *Larche*, 363 U.S. 420 (1960). In 50 U.S.C.A. App. Section 460(b) (3) Congress has substantially insulated the factual determinations

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[3] Government Printing Office (1967).

of local and appeal boards. Review of such determinations in a hearing at which counsel is present is restricted to habeas corpus after, or criminal prosecution for refusal of, induction. The scope of review is limited to the question whether there was any "basis in fact" for the classification assigned. While judicial review is thus substantially restricted, the decision of the local board obviously has a dramatic impact on the registrant's life and liberty.

It is contended that since a conscientious objector hearing is an inquiry into the registrant's state of mind, the presence of counsel would not only be of no assistance but, because of the probability that he would make vesatious objections to questions and testimony, counsel's presence would be to the registrant's disadvantage. It is unrealistic to assume that an attorney who is familiar with the very limited scope of judicial review available would do anything which would antagonize a local board or leave it with an impression other than one of complete candor. Also, the registrant will be more able to present his case if he is articulately represented by counsel.

Counsel will also act as a deterrent to possible abrupt or summary treatment of the registrant's claim *(Cf., United States* v. *Wade,* 388 U.S. 218 (1967)). He may also bridge potential hostilities which result from the difference in ages between the board members (who are between 30 and 75 years old, 32 C.F.R. Section 1604.52(c), (d)) and the registrant. Through questioning or argument, counsel can clear up any inconsistencies or vagaries in the registrant's testimony before the board which, if uncorrected, might lead the board to decide against an otherwise qualified registrant. Counsel would be very familiar with the requisite statues, regulations, and interpretative cases. The registrant may never have previously been required to articulate his beliefs and he may omit or confuse critical aspects of his beliefs. The presence of counsel would be crucial to leaving

the board with a complete portrayal of the registrant's relevant beliefs. Finally, a brief summary by counsel may focus the board's attention on the elements of a conscientious objector claim and relate them to what the registrant has said, pointing out why the registrant should be believed. For a review of some of the difficulties encountered in passing on conscientious objector claims, see *United States* v. *Houghten*, 9th Cir. No. 23,556, June 19, 1969. All of the above roles are ones in which attorneys commonly operate, but with which a registrant is likely to have little familiarity. Of course, a registrant is always free to appear without counsel if he concludes that this would be to his advantage. Finally, a local board is not without power to terminate a hearing which is being unduly extended by counsel.

It could be argued that 32 C.F.R. Section 1604.41, providing that "Advisors to registrants may be appointed . . . to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law" supplies such procedural safeguards as to remove from 32 C.F.R. Section 1624.1(b) the taint of doubtful constitutionality.[3] This does not follow. Even assuming that the appeal agent would be legally qualified, 32 C.F.R. Section 1604.71(c), there is no provision for his appearance before the board except when the board so requests. 32 C.F.R. Section 1604.71(d) (2).

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[3] 32 C.F.R. Section 1604.71 provides as follows regarding these advisors (appeal agents):

(c) Each government appeal agent and associate government appeal agent shall be, whenever possible, a person with legal training and experience.
(d) It shall be the duty of the government appeal agent . . .
(1) to appeal . . . from any classification of a registrant by the local board which is brought to his attention and, in his opinion, should be reviewed by the appeal board.
(2) To attend such local board meetings as the local board may request him to attend.

Furthermore subsection (d) (5) injects such a conflict of interest[5] into any representation the appeal agent may provide that it is doubtful that he could act for the registrant in the role of an attorney.[6] He certainly cannot claim to represent the best interests of the registrant and still be in compliance with subsection (d) (5).

Accordingly, this Court is loathe to hold that the administrative denial of such a right is either authorized by Congress or is unconstitutional.

The motion to dismiss is granted.

Dated:

/s/ Robert F. Peckham
United States District
Judge

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(3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered . . .

(5) *To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.* [Emphasis added.]

[5] In an August 20, 1968 letter, written at the direction of the Board of Governors of the State Bar of California by Staff Attorney Mary G. Wailes, to all members of the Bar serving as Government Appeal Agents, it was stated: "The Board wishes you to be advised, however, that in its opinion in acting as an appeal agent you may be exercising dual responsibilities that could put you in a position of representing conflicting interests."

[6] "To permit the inroad of a class of legal advisers being used as undisclosed informants for the Federal Government will confirm the suspicion and distrust with which some laymen approach full disclosure of their vital interests to their lawyers . . . The ill-considered directive of General Hershey, already disavowed by government legal specialists, is clearly improper." *Lawyers Cannot be Informants*, 54 A.B.A.J. 153, 154 (1968).

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-102

WALTER JOHN MCANDREW AND LAWRENCE EDWARD MCANDREW BY THEIR GUARDIAN AD LITEM WALTER JOSEPH MCANDREW

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners registered with their local draft board when they were 18 years old and were ultimately classified I-A. They sought a personal appearance before the board in an attempt to be reclassified I-A-O (conscientious objection). Both appeared with counsel but were denied the assistance of counsel by the Board. They refused to proceed without counsel. The Board later informed petitioners that their classifications were to remain as before. Petitioners then filed timely requests for administrative appeals but also brought this action in the district court to set aside their I-A classifications and to require the

Board to grant new personal appearances at which they would be allowed representation by counsel (Pet. App. 4).

We respectfully invite the attention of the Court to the following facts which show that the petition for a writ of certiorari was filed out of time:

On March 12, 1971, the court of appeals affirmed the district court's order of dismissal in this case (Pet. App. 1). A timely petition for rehearing was denied by the court of appeals on April 12, 1971 (Pet. App. 2). The time within which to file a petition for a writ of certiorari therefore expired on July 12, 1971, and no extension was sought. The petition was filed on July 19, 1971, 98 days after the denial of rehearing.

28 U.S.C. 2101(c) provides that "any writ of certiorari intended to bring any judgment or decree in a civil action * * * before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." Since this limitation is jurisdictional, the petition should be denied as untimely.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

U. S. GOVERNMENT PRINTING OFFICE: 1971